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According to the court of Civil Appeals of Texas, in the case of San Antonio Gas Co. v. State, it may be shown, like any other circumstance, to prove combination of corporations in violation of the anti-trust law, that an ordinance extending their franchises was sought, obtained and accepted by them in furtherance of an unlawful design to restrain trade and stifle competition; and that a combination is within the denouncement of the statute defining a "trust" as a "combination, * * * by 200 or more, * * * to increase or reduce the price" of commodities, though there is no bad motive, and its immediate result is a reduction in price, if its object is in restraint of trade and to create a monopoly.

A Kentucky correspondent has sent to us an exceedingly interesting and learned opinion recently delivered by Hon. Sterling B. Toney, Judge of the Law and Equity Division of the Louisville Circuit Court, regarding some legal phases of commercial paper. Incidentally it was held in the case—Deppen v. German-American Title Co.—that where an insolvent corporation has made a general deed of assignment for the benefit of its creditors, and the assignee has instituted suit to wind up its affairs, it is too late for a stockholder to file a suit to rescind his stock subscription on the ground of fraud. But the main point of the decision seems to have been that promissory notes payable to the Great American Title Co., or bearer, are negotiable instruments at common law, and in Kentucky, although not made payable and negotiable at a State or federal bank in this State, and in the hands of an innocent purchaser, before maturity, for value and without notice, are not subject to existing equities or defenses between the original parties. The opinion contains an analytical review and examination of the legal history of the negotiability of promissory notes before and after the Statute 3 and 4 Anne, and of the English and American decisions on the subject; also an examination and construction of the Kentucky Statutes and the decisions thereunder touching the assignability and negotiability of promissory notes in that State.

The Supreme Court of Illinois, in the case of Allaire v. St. Luke's Hospital, has decided that an infant cannot maintain an action for injuries received before its birth. This question has been a more or less open one. There appears to have been only two cases wherein it was attempted to maintain actions involving the question presented, viz.: Dietrich v. Inhabitants of Northampton, 138 Mass. 14, and Walker v. Railway Co., 28 L. R. Ir. 69, 32 Cent. L. J. 197. In the former case it was held that the action could not be maintained, the supreme court saying: " 'Taking all of the foregoing considerations into account, and, further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning.' In Walker v. Railway Co. the statement of claim was substantially, that Annie Walker, mother of the plaintiff, while quick with the child, became a passenger on the defendant's railway, and was so received by the defendant, and that the defendant so carelessly and negligently conducted itself in carrying said Annie Walker and in managing its railway that the plaintiff was thereby injured, crippled, and deformed. A demurrer was sustained to the statement of claim, all the judges concurring in the opinion that it was defective in not showing a contractual relation between the plaintiff and the railway company, but merely averring a contract between the mother of the plaintiff and the company. The question, however, whether such an action could be maintained by an infant in its mother's womb at the time of the alleged injury, could, under any circumstances, be maintained, was discussed elaborately, and with great learning, both by court and counsel. O'Brien, C. J., after discussing the question, expressly declined to commit himself by an opinion, leaving it, as he said, 'an open question,' so far as he was concerned. Harrison, J., while basing his decision on the insufficiency of the statement of claim, says, in his opinion: 'When the

accident occurred, on the 12th of June, the plaintiff was still unborn, and had no existence apart from her mother, who was the only person whom the defendants contracted to carry on their line,' etc. Johnson, J., in his opinion, says: 'As a matter of fact, when the act of negligence occurred the plaintiff was not *in esse*,—was not a person, or a passenger, or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action.' Again, commenting on the claim of liability, the same learned judge says: 'If it did not spring out of control, it must, I apprehend, have arisen, if at all, from the relative situation and circumstances of the defendant and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence,—was not a human being, and was not a passenger in fact. As Lord Coke says, the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which was not *in esse* in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of duty.' O'Brien, J., in his opinion, says of the action: "It is admitted that such a thing was never heard of before, and yet the circumstances which would give rise to such a claim must at one time or another have existed.' In Dietrich v. Inhabitants of Northampton, *supra*, the court says: 'But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb.' The Illinois court says: 'Appellant's counsel substantially admits that there is no precedent for the action. While it is true that this is not conclusive that the action may not be maintained, yet, in view of the fact that, as said by Mr. Associate Justice O'Brien, similar circumstances must have before occurred, it is entitled to great weight, especially when the right to maintain the action is, to say the least, doubtful. Mr. Associate Justice O'Brien, in Walker v. Railway Co., says: 'The law is, in some respects, a stream, that gathers accretions, with time, from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and, if these are to be altered,—if new rights and engagements are to be created,—that is the province of legislation and not decision.' In this we fully concur. That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie." Boggs, J., dissented from the conclusion of the court in the Illinois case in a vigorous opinion chiefly grounded upon principle.

NOTES OF IMPORTANT DECISIONS.

BILLS AND NOTES—EXTENSION OF TIME—RELEASE OF SURETY.—The Court of Civil Appeals of Texas hold, in Zapalac v. Zapp, 54 S. W. Rep. 938, that where the holder of a note, after having received information that one of the signers was only a surety, extends the time of payment thereof without the surety's consent, the surety is thereby released, though the holder had no knowledge that the surety was not a joint maker at the time he took the note. "There was evidence," says the court, "adduced on the trial to show that Zapalac signed the note as surety for Sladek, and that with knowledge of such fact Zapp extended the time of payment by an agreement to that effect with Sladek without the consent of Zapalac. The note bore interest, and there was no proof of any other consideration for the extension. A contract for the extension of the time of payment of a note for a definite period when the debt bears interest is upon a valuable consideration, and is binding between the parties. Benson v. Phipps, 87 Tex. 578, 29 S. W. Rep. 1061. Parol evidence was admissible to show that Zapalac signed the note as surety for Sladek, and if Zapp, with knowledge of that fact, by a binding contract extended the time of payment for a definite period without the consent of Zapalac, the latter would be released. Burke v. Cruger, 8 Tex. 67; 2 Daniel, Neg. Inst. § 1338.

Zapp became the holder of the note by indorsement from Farek before maturity, and it became

an issue for the jury whether he had knowledge of the fact that Zapalac was only surety for Sladek; the evidence on the issue tending to show that such knowledge, if any, was acquired after the maturity of the note, but before the extension thereof. Upon this issue the court charged the jury that, if Zapp became the holder of the note before maturity, and did not know at the time that Zapalac had signed as surety for Sladek, Zapalac would not be entitled to the right of a surety, and to find for the plaintiff. This is the substance of the third and fourth paragraphs of the charge. The evidence was such that the jury may have believed that Zapp granted the extension without the consent of Zapalac, and knew at the time that Zapalac was a surety for Sladek, but did not believe that Zapp knew it when he got the note, and, as required by the charge, found for the plaintiff because of the want of such knowledge at the time when he became the holder of the note, although he may have known that Zapalac was only a surety when the extension was granted. So the question arises, is it the knowledge of the holder at the time he took the note, or at the time of the act complained of, that must be shown by the surety to entitle him to a discharge? Of course, the note must have been acquired before maturity or the question could not arise. Daniel, in his work on Negotiable Instruments, does not favor the admission of parol evidence to show that one who signs as principal is in fact a surety for his co-promisor, but states that the weight of authority in the United States is in favor of allowing evidence to show that one of the joint promisors signed as surety, and that this was known to the payee or indorsee when he took the instrument. He also says: 'And there are cases that hold that, if he knew the fact that one of the promisors was surety at the time when he granted indulgence to the other, it will be equally as effectual as a discharge of the surety promisor.' 2 Daniel. Neg. Inst. § 1338. Randolph states the rule to be 'that notice to a holder to subject him to such defense of suretyship need not antedate his becoming a party to the instrument.' 1 Rand. Com. Paper, at page 225, note 2. The charge of the court may have grown out of a misconstruction of the language of note 12,616, under article 3811, Batts' Rev. St. The cases cited do not bear out the construction that the holder must have knowledge when he takes the notes. Burke v. Cruger, *supra*, is only authority that parol evidence will be received to show the fact of suretyship, and the knowledge thereof. But a case is cited in Burke v. Cruger in which the opinion states that the suretyship must be known at the time of the act complained of, though the facts do not appear to have raised the exact question. Gahn v. Niemcewicz, 11 Wend. 323. In Yeary v. Smith, 45 Tex. 71, the point is not raised but the court uses this language: 'Parol evidence is admissible in equity to show the relationship which the obligators bore to each other and that the creditor was cognizant of it.' The language of the note in Batts' Rev. St., and the authorities cited by him, appear to have been taken from Behrens v. Rogers (Tex. Civ. App.), 40 S. W. Rep. 419. But the question was not before the court in that case. None of the cases cited by Batts support the construction of the language given by the court below in the charge complained of. No Texas case, as far as we have been able to see, has decided the question, but it may be gathered from the decisions that knowledge of the suretyship at the time of the act complained of is deemed sufficient. We are of the opinion that such should be the rule, and hold that the charge complained of was erroneous."

GRAIN RECEIPT—MODIFICATION BY PAROL.—In Thompson v. Thompson, 81 N. W. Rep. 543, decided in the Supreme Court of Minnesota, it was held, upon reargument, the court receding from a former ruling, that a receipt issued under the provisions of section 7646 of the General Statutes of 1894 of Minnesota for the storage of grain cannot be subsequently modified or changed by parol. The court said:

"This case, decided at the present term (December 18, 1899), and reported on page 204, 81 N. W. Rep., has, by the direction of the court, been reargued upon the single contention whether the verbal modification of the terms of certain warehouse receipts adopted subsequently to the execution and delivery of the same were valid and enforceable contracts under the warehouse laws of this State. When the case was previously considered, two members of this court, as then constituted—Collins and Brown, JJ.—dissented from the view therein adopted by the majority, viz.: that such parol modification might be legally entered into between the original parties, and that the contract, when so modified, might be enforced. But upon further reflection the court were not satisfied that sufficient importance had, in their previous view, been attached to the public nature of the statute under which the receipts had been issued, or that public policy required these receipts to be made an exception to the usual common-law rule which permits written agreements to be changed by subsequent oral consent of the parties. We have fully considered the question involved, and are of the opinion that the ruling of the court upon the former hearing, in the respect referred to, cannot be allowed to remain as the authority of this court, while we adhere otherwise to the result therein reached. It will not be necessary to set out either the statutes or the facts involved, as they are stated at length in the opinion of Justice Canty on the former hearing. The particular provision of the warehouse receipts involved related to the charges for storage and the insurance of the grain described therein—matters which, under the terms of the statute (Gen. St. 1894, sec. 7646), are expressly required, by its very terms, to be 'in

writing.' The amount of charges for storage under this law must be stated in the receipt when issued (in this case after the receipts were issued). The obligation to insure in the original contract by the warehouseman on one side was, as claimed, waived by the owner of the receipts upon condition that no charges should be made for storage, which agreement was evidenced only by the verbal understanding of the parties. The necessity of giving to the warehouse laws of this State, and particularly those portions providing for the storage of produce, cannot be easily exaggerated. The tickets designating the amount of grain, charge for storage, and the ownership of the property, pass from hand to hand among our citizens, in ordinary commercial transactions, in lieu of the grain itself, and are symbolic both of the title which actually passes by such transfers and of the money value which the property is worth at any given time, constituting the warehouseman a bailee of the owner, and subjecting him to severe penal consequences should he make misstatements therein, or to prosecution for felony should he dispose of the property intrusted to his care without consent of the owner. In view of the extensive interests involved, which have excited the solicitude and received the constant and earnest attention of the legislature to protect the agricultural interests of the commonwealth, as well as the danger of defeating the objects to be attained by the law, these statutory contracts of bailment should be in writing, should be definite and certain, not only when issued, but definite and certain as long as they continue to represent the title to the property, and so long as they stand for exact money values in the business transactions of daily life. It was a wise purpose of the legislature that led to the enactment of the warehouse laws of this State, and that required receipts issued thereunder to be in writing, and it was evidently the purpose of the lawmakers that no change of such contract should be made subsequently, unless the same was also expressed in writing; for, while such receipts continue to be contracts of bailment and negotiable, they should, for the same reasons, continue to be as certain and definite as writing can make them, and ought not to be changed by oral modifications that cannot but involve all transactions with them uncertain and confusing, and so destroy their efficiency for the purposes intended by the lawmakers. There is abundant authority to support the view that a contract which public policy requires to be in writing cannot be changed or modified by parol. State v. Stevenson, 52 Iowa, 701, 3 N. W. Rep. 743; Sykes v. People, 127 Ill. 117, 19 N. E. Rep. 705, 2 L. R. A. 461; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. Rep. 239, 31 L. Ed. 263; Seaman v. O'Hara, 29 Mich. 66; Leonard v. Dunton, 51 Ill. 482; Brown v. Sanborn, 21 Minn. 402; Heisley v. Swanstrom, 40 Minn. 196, 41 N. W. Rep. 1029; Burns v. Real Estate Co., 52 Minn. 31, 53 N. W. Rep. 1017. For the reasons above stated, we hold that the modification of these receipts, made subsequent to their execution, was invalid, and that these contracts must be interpreted upon their original provisions expressed in writing. Judgment reversed."

LIBEL—PRIVILEGED COMMUNICATIONS—MALICE.—It is decided by the Supreme Court of Iowa, in Nichols v. Eaton, that a communication by a life insurance company to its soliciting agent with relation to an alleged forgery by an examining physician of the signature to an application for insurance, and informing him that another physician would be appointed to make examinations, being upon a subject relating to the agency, and in respect to which there is a mutual interest, is a privileged occasion, and that in an action for libel, based upon a communication that is privileged, the question whether there is such excess of statement in the communication as to constitute evidence of malice is for the jury. The court says in part:

"Privileged communications or publications are of two kinds: First, absolute; second, conditional or qualified. When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it was published. When qualified, however, the plaintiff may recover, if he shows that it was actuated by malice. In determining whether or not the communication was qualifiedly privileged, regard must be had of the occasion, and of the relationship of the parties. One may make a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable. In the protection of his own interests, one may make a communication to his agent or servant without subjecting himself to liability, unless he exceeds the privilege, and does more than his duty or interest demands. Again, when one has an interest in the subject-matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged, by reason of the occasion. Generally this interest must be a pecuniary one, but it may arise out of the relationship or *status* of the parties. The statement must be such as the occasion warrants, and must be made in good faith to protect the interests of the publisher and the person to whom it was addressed. A communication by a principal to his agent touching the business of the agency is not actionable, without proof that the principal was actuated by malice toward the person to whom the communication relates. Now, the evidence in this case does not show very clearly whether the Milnes application was forwarded to the association by plaintiff or by the soliciting agent. From the fact that the letter regarding the application was sent to Botts, it would appear that he had sent the application. But, be this as it may, Botts, as soliciting agent, was entitled to know who was the accredited medical examiner of the association at

the town where he was taking applications. The company also had the right to inform its soliciting agent of the discharge of its medical examiner in the locality where the soliciting agent was operating. The occasion was undoubtedly privileged, and it was the duty of the court to so instruct the jury. Appellee says that, conceding the occasion was privileged, defendant went beyond the privilege, and rendered itself liable. This argument presents a question that is new to this court, and one on which the authorities are in apparent conflict. Decision of the point involves a consideration of the reasons underlying the doctrine of privilege. Ordinarily, proof of a defamatory publication, charging another with the commission of crime, makes out a *prima facie* case of malice in the author. But a privileged communication is an exception to the rule. In such case the presumption of malice is rebutted, and the burden of proving the existence of this element of the action is on plaintiff. In other words, actual malice must be shown. White v. Nicholls, 3 How. 286, 11 L. Ed. 591; Briggs v. Garrett, 111 Pa. St. 414, 2 Atl. Rep. 513; Bearce v. Bass, 88 Me. 521, 34 Atl. Rep. 411. Bacon v. Railroad Co. (Mich.), 33 N. W. Rep. 181, is an instructive and well-considered case on this point. It is there said: 'The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of plaintiff, and throws on him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. * * * The effect, therefore, of showing that the communication was made on a privileged occasion is *prima facie* to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact (that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff); and this malice in fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury.'

"Plaintiff relies on some expressions found in the books to the effect that, if the communication exceeds the privilege, it destroys the privilege. Thus, Mr. Odger, in his work on Slander and Libel (page 197), says: 'But it must be remembered that, although the occasion may be privileged, it is not every communication made on such occasion that is privileged. "It is not enough to have an interest or duty in making the communication. The interest or duty must be shown to exist, in making the communication complained of." Per Dowse, B., in 6 L. R. Ir., at page 269. A communication which goes beyond the occasion exceeds the privilege.' Again, at page 245, it is said: 'So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject-matter thereof, the defendant must be careful not to branch out onto extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect of which the parties have a common interest or duty.' We have recognized some of the rules here announced. See State v. Hoskins (Iowa), 80 N. W. Rep. 1063. There the occasion was not privileged, because made to persons who were in no manner interested in the publication. The doctrines announced by Mr. Odgers, some of which are even stronger than we have quoted, have produced some confusion in the authorities, and we think the better rule is that if the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of statement is material only as bearing on the question of malice. Indeed, the jury may find the existence of malice from the language of the communication itself, as well as from extrinsic evidence. Hastings v. Lusk, 22 Wend. 410-421; Nevill v. Insurance Co. (1895), 2 Q. B. 156; Railway Co. v. Behee (Tex. Civ. App.), 21 S. W. Rep. 384. Whether the publication is or is not privileged by reason of the occasion is a question of law, for the judge alone, where there is no dispute as to the circumstances under which it was made. If the judge decides that the occasion was one of qualified or conditional privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he does give any evidence, which, as we have said, may be gathered from the publication itself, the question of *bona fides* becomes one of fact, for the jury. 1 Am. Lead. Cas. (5th Ed.) 193; Gray v. Pentland, 4 Serg. & R. 420; Hart v. Reed, 1 B. Mon. 166; Newell, Sland. & L. p. 478. In Hill v. Drainage Co. (Sup.), 29 N. Y. Supp. 427, it is said: 'In case a communication is *prima facie* privileged, the existence or non-existence of malice on the part of the defendant is a question of fact; and the plaintiff, before he can recover, must affirmatively establish to the satisfaction of the jury that the publication complained of was made through malice. This may be shown from the communication, the circumstances under which it was written, and it may be inferred from a variety of facts. * * * The occasion was privileged. Did the publication go beyond the occasion, or, in other words, was more written than the occasion justified? This depends upon the terms of the communication, and the facts outside of it, and was an issue of fact, for the jury.' See also Comfort v. Young, 100 Iowa, 627, 69 N. W. Rep. 1032; Strode v. Clement (Va.), 19 S. E. Rep. 177; Klinck v. Colby, 46 N. Y. 427. The instructions given by the trial court were, for the reason stated, erroneous."

PROPERTY DESTROYED PENDING EXECUTORY CONTRACT OF CONVEYANCE.

Where an owner of land contracts to convey the same in the future, and before the conveyance is complete the buildings thereon, in whole or in part, are destroyed by fire, the question arises: Upon whom falls the loss occasioned by the destruction, the vendor or the vendee? The vendor feels, very naturally, that the vendee should bear the loss, because he, the vendor, was bound by his contract to convey the property to the vendee, and had no further real interest in it other than that which the execution and delivery of a deed under his contract would devest. On the other hand, the vendee just as naturally feels that the vendor should bear the loss, because a deed of conveyance of property partially destroyed is not what he bargained for. If the parties in making their contract have contemplated a possible destruction and expressed their intention as to where the loss shall fall, there can be no possible difficulty, for then there is nothing to do but to carry out the expressed intentions of the parties, whether the case arises at law or in equity. It is when no intention is thus expressed that difficulties may arise, for then it may become necessary to determine what the parties are presumed to have intended. And here we find the rule at common law and the rule in equity often in direct opposition. At common law the title or dominion remains in the vendor until the conveyance is actually consummated; and, therefore, upon a destruction before the conveyance, the contract fails for want of consideration, and the loss falls upon the vendor. But in equity, that which ought to be done is regarded as done; and, therefore, wherever specific performance of the contract would have been enforced before the occurrence of the destruction,—where it can be determined that a conveyance ought to have been made prior to the destruction,—the equitable ownership is held to have passed to the vendee, and the loss falls upon him. The rule at common law is well expressed by Pomeroy in Equity Jurisprudence,[1] as follows: "What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties, and creates no interest in nor lien nor charge upon the land inself. The vendor remains to all intents the owner of the land. * * * On the other hand, the vendee acquires no interest nor property right whatever. * * * The relations between the two contracting parties are wholly personal. No change is made until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee." The same learned author well expresses the rule in equity:[2] "By the terms of the contract the land ought to be conveyed to the vendee, and the purchase money ought to be transferred to the vendor; equity, therefore, regards these as done; the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land. * * * The consequences of this doctrine are all followed out. * * * The vendee is entitled to any improvement or increment in the value of the land after the conclusion of the contract, and must himself bear any and all accidental injuries, losses or wrongs done to the soil by the operations of nature, or by tortious third persons not acting under the vendor." Why is equity thus opposed to common law? Simply because the common law gives effect only to the intentions of the parties as expressed in the contract, whilst equity effectuates the presumed intentions of the parties in the absence of any expression on this particular point. So, therefore, in the case of an ordinary executory contract of sale, where nothing is said about who shall be the owner until the deed is delivered, the common law leaves the ownership and all its incidents in the vendor; whereas, in equity, when a sale of this kind occurs and nothing is said to indicate the will of the parties in respect of the ownership before delivery of the deed, it is presumed that the parties intended that the vendee should have the benefits and the burdens of ownership from the time of the contract. And that is just, for nothing remains to be done in such a case but the mere giving of a deed, and, as that ought to

[1] Pom. Eq. Jur. sec. 367.

[2] *Ibid.* sec. 368.

be done at once, equity, in accordance with one of the most ancient and salutary of its maxims, regards it as done. And this well known maxim makes manifest the whole reason of the rule under consideration. The rule and its reason are no where better expressed than in the following language of the Supreme Court of Kansas, by Valentine, J.:[3] "In equity there is a maxim that equity will consider as done that which ought to be done, and that it will look upon things agreed to be done as actually performed. As an application of this maxim equity generally considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time the sale is made becomes the vendee's, and the purchase money the vendor's; that the vendor becomes at once the trustee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money."

But now, suppose that the parties have expressly stipulated that the purchase money shall be paid and the deed given on a day named, and that time shall be of the essence of the contract. In such a case who shall bear the loss of buildings destroyed before the appointed time? Equity regards as done that which ought to be done; but equity will surely not regard as done that which ought not to be done; and it can never be said that the deed ought to have been given before the loss contrary to the express provisions of the contract. Said Baron Alderson in a leading English case:[4] "I do not see, therefore, why, if the parties choose, even arbitrarily, provided both of them intend to do so, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. That is the real contract. The parties had a right to make it. Why, then, should a court of equity interfere to make a new contract which the parties have not made?" We deem it clear, therefore, that when parties to an executory contract of sale have expressed their intention to fix a time for the delivery of the deed and expressly made that time of the essence of the contract, it cannot with reason be said that a deed ought to be given before that time. It is equally clear that the maxim, that equity regards as done that which ought to be done, cannot possibly apply until the arrival of the time when the deed ought to be given, *i. e.*, the time so fixed by the parties and made of the essence of their contract. The conclusion therefore is unavoidable that the rule of equity, based on this maxim, which works an equitable conversion at the time of the contract for the purpose of effectuating the presumed intention of the parties, cannot be applied to circumvent the intention of the parties otherwise by them actually expressed. In the language of the Court of Appeals of New York:[5] "The equitable doctrine which protects an individual who has contracted for the purchase of land and treats him as the owner, and the vendor as the owner of the purchase money, is not an invariable rule, and is subject to some exceptions. It cannot be applied when the intention of the parties is clearly adverse to any such presumption." And the Supreme Court of Kansas, by Valentine, J.,[6] referring to the equitable maxim under consideration, said: "But this maxim never applies where time is of the essence of the contract. * * * Equity never looks upon a thing as done which ought not to be done. * * * It is undoubtedly true, when the parties so agree, that title, both legal and equitable, may pass before the purchase money or any part of it is paid; but it can hardly be supposed that such title will pass against the consent of the parties in violation of their contract." Again, where the parties do not expressly stipulate that the appointed time shall be of the essence of the contract, yet where there are dependent conditions to be performed on the day named which would have prevented a decree of specific performance before the accidental loss, it cannot be presumed that the parties intended that the ownership should pass to the vendee until the time fixed for the deed; and it were contrary to reason to affirm that equity will consider, in such a case, that a deed had been given, in order to effectuate a presumed intention. This is in full accord with the following language of Vice Chancellor McCoun in a leading New York case:[7] "Whatever notions may have been formerly

[3] Douglas County v. Union Pac. R. Co., 5 Kan. 615, 622.

[4] Hipwell v. Knight, 1 Younge & Coll. 415.

[5] Bostwick v. Frankfield, 74 N. Y. 207, 215.

[6] Douglas County v. Union Pac. R. Co., 5 Kan. 615, 622.

[7] Wells v. Smith, 2 Edw. Ch. (N. Y.) 78, 82.

entertained as to the time specified in the contract, not being material and to be unregarded as an essential, it is now admitted that time may be made of the essence of the contract, and effect will be given to it as well in equity as at law. * * * Since, then, parties entering into a contract may make the time of performance a material part of it, have they done so in the case now under consideration? The agreement in question is precise and particular as to the day, on or before which several things are to be done. Those on the part of the purchaser are conditions to the defendants giving a deed, and which is the only thing she is to perform. If the agreement had gone no further than merely to specify the day of performance, then, considering the subject-matter of the contract, it might not be deemed in equity so essential as to require a strict performance on the day. * * * But where, as in the present case, the vendor requires and the purchaser agrees to make it a condition of the contract, and they insert the same as a distinct and substantive part of the agreement, namely, that a failure or neglect of the purchaser to perform all or any one of his covenants at the time specified (including the payment of the purchase money on a future day) shall absolutely determine the contract, * * * it appears impossible to regard it as an unmeaning provision. * * * The condition of the contract in question is clearly a condition precedent. No one can perceive it without perceiving that every act which the complainant has stipulated to perform is antecedent to what the defendant is to do. The performance of the covenants on the part of the former are made the consideration of the covenant of the latter to convey to him. It is only upon these conditions that a deed is to be executed and delivered. If he fail in any one particular, the agreement ceases to be obligatory upon her. * * * There are no words of grant in the contract itself. * * * Equity cannot interpose to relieve from the consequences of a condition precedent unperformed, although with respect to a condition subsequent the doctrine is very different. * * * It is founded in reason and justice. * * * No court of law or equity can have a right to say that the condition which is lawful in itself and one the party had a right to impose shall be dispensed with. In order to do this, the contract or act of the party himself must be annulled and one created by the court put in its place. This would be contrary to reason and an assumption of power which I for one must disclaim. * * * The title did not pass; and I am not at liberty to suppose the parties intended it should have passed, or that any effect was to be given to the contract beyond the plain import of its terms or inconsistent with the rules of law." Also the following language of Chancellor Walworth in the same case on appeal is clearly in point:[8] "There cannot be a doubt that it was the intention of the parties in this case to make the time specified an essential part of the contract. It is hardly possible to make language more explicit. The contract was, that if the complainant failed or neglected to perform all or any of the convenants therein contained on his part at the time or times thereinbefore limited, then, and in such case, all the covenants and agreements on the part of the defendant should cease and be absolutely void. * * * As to the power of the vendor, or of the purchaser, to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt. * * * It would therefore not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law. * * * Under such circumstances, if the property had very much increased in value after the making of the original contract, the defendant is fairly entitled to the benefit thereof under the agreement by which the complainant contracted to relinquish all claims upon the property, either at law or in equity, if he did not comply with the terms of the agreement at the day. And there is nothing inequitable or unconscientious in her insisting upon this part of the contract. I think the vice chancellor was right in not making a new contract for her, contrary to the understanding of both parties when they entered into this agreement." It would also seem that an expression in the contract to convey that upon failure of pay-

[8] Wells v. Smith, 7 Paige Ch. (N. Y.) 22, 23.

ment on the day named "the contract shall be void," makes time of the essence of the contract, so as to prevent the operation of the fiction by means whereof equity would have regarded the vendee as the owner from the time of the contract in the absence of an expressed intention. This was considered and decided by Chancellor Kent:[9] "There was an express stipulation in this contract, that if the plaintiff failed in either of his payments the agreement was to be void. The first question that naturally presents itself is, whether the time was not here made of the essence of the contract. * * * It seems to be conducive to the preservation of good faith, and the rights of parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the courts should not interfere, as of course, to annul such a provision. * * * It was formerly supposed that the time fixed on for the completion of the contract was quite immaterial; and there are some cases which have given countenance to this idea. * * * I do not perceive that in the more ancient cases there is real ground for the opinion that the time stipulated for the performance of the contract is of no moment in this court, and I am at a loss to perceive how such an extravagant proposition should ever have gained currency. It is certainly and very justly exploded in the modern decisions."

Where time is thus of the essence of the contract to convey, the payment of the whole or a part of the purchase price on a day named for the delivery of the deed is made a condition to be performed before the title passes to the purchaser, and the delivery of the deed on that day is made a condition to the obligation to pay or to perform other things agreed upon. Where this so, there is no room for a presumption that the parties intended that the title should pass before the day agreed upon, and neither room nor reason for the operation of the equitable maxim to the effect that a deed should have been given before the time, and, therefore, that, in equity, a deed had been given. When the date of performance arrives, and the buildings have been destroyed by fire, the vendor cannot perform his contract by tendering a deed of the land without offering to deduct from the purchase price the value of the buildings destroyed, or to rebuild them if possible. Such a deed is not sufficiently potent to convey things not in existence, and that the buildings would be in existence on the day fixed so that the deed would convey them to the vendee, was the plain intention and contract of the parties. This was decided by the Supreme Judicial Court of Massachusetts, speaking through Wilde, J.,[10] as follows: "Nor could this contract be enforced by a court of equity having jurisdiction of the subject-matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. * * * Formerly the principle was the same in equity as it ever has been in law. And in one respect the principle still remains the same, namely, that the loss of the property, under similar circumstances as those in the present case, must be borne by the owner of the property at the time the loss happened, and it seems impossible that any different principle can be adopted. As we therefore cannot recognize the fiction in equity, by which a purchase and an agreement to purchase are held to be similar, and indeed identical in respect to the present question, we must hold that the defendant is bound to repay the purchase money, as the consideration upon which it was paid has wholly failed, the plaintiff not being bound, under the circumstances of the case, to accept a deed of the land." That case was referred to with approval in a later case in the same court,[11] which involved a contract to convey land and buildings at a day certain in the future, upon the payment on the same day of the balance of the purchase price. It appeared that after the contract, and the day before the day appointed for the transfer, the buildings were burned. For this reason the vendee refused to pay the balance of the purchase money, and the vendor, after tendering a deed for the land, sued for the balance. In evidence it was shown that "the estate at the time of the contract was worth at least $3,750, but after the fire was worth not more than $2,000." The trial court gave the judgment for the plaintiff vendor. Reversing the judgment the appellate court, by Gray, J., said: "The principles of law upon which the rights of the parties to this case depend appear to

[9] Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 370, 374.

[10] Thompson v. Gould, 20 Pick. (Mass.) 134.

[11] Wells v. Calnan, 107 Mass. 514.

have been overlooked at the trial. When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time, and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain the purchase money. * * * In the present case the agreement between the parties manifestly contemplates the conveyance of the buildings already upon the land as an important part of the subject-matter of the contract. It describes the property to be conveyed as the farm occupied by the vendor and his father, and contains a provision that until the day appointed for the delivery of the deed no wood shall be cut and removed from the premises save fire wood for use in the house. The vendor agrees to execute and deliver a proper deed for the conveying and assuring to the purchaser of the fee-simple of 'said premises.' The price stipulated to be paid is an entire sum, and the report states that it appeared in evidence at the trial that the estate at the time of the contract was worth at least that sum, and after the fire was not worth two-thirds as much. * * * In the case at bar the defendant has only agreed to pay the purchase money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land, and the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not and could not tender such a conveyance as he had agreed to make, or as the defendant was bound to accept, and was not, therefore, entitled to maintain any action against the defendant upon the agreement." And the court further says that this doctrine "has been approved in the later English cases," citing them.[12]

FRANCIS J. KEARFUL.

Oklahoma City, Okla.

[12] Appleby v. Meyers, L. R. 1 C. P. 615, 2 C. P. 651; Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davison, L. R. 6 Exch. 269.

CONTRACTS IN RESTRAINT OF TRADE—VALIDITY.

LANZIT v. J. W. SEFTON MFG. CO.

Supreme Court of Illinois, February 19, 1900.

A contract made by a person engaged in a particular business, based on a valuable consideration, whereby he agrees not to engage in such business within the State where the contract is made, and where he is so engaged at the time of entering into the contract, and an adjoining State, is void, as against public policy.

CARTER, J.: Upon its bill in equity brought in the superior court of Cook county, appellee obtained a decree enjoining appellant, for a period of 10 years from February 3, 1897, from following or engaging in, directly or indirectly, in any capacity whatever, the business of manufacturing, selling, handling, or dealing in paper receptacles, oyster pails, paper clothing boxes, folding paper boxes, or paper novelties of any kind or description whatever, and from furnishing any person, firm or corporation with any information relating to or concerning any of said business, in the States of Illinois and Indiana, and each of them, and from continuing in the employment of the Fred Rentz Paper Company, and from dealing in said goods in connection with said company in said two States, and each of them. The bill and decree were based upon the following contract between appellant and appellee: "Chicago, Ill., February 3, 1897. As a special consideration for the purchase this day by the J. W. Sefton Manufacturing Company (an Indiana corporation, doing business, also, in Chicago) from me of my share and interest in and to the said business heretofore conducted by myself and Mrs. Margaret Banks at Chicago, Illinois, under the firm name and style of Joseph J. Lanzit Manufacturing Company, in accordance with the terms of a certain bill of sale made at Chicago, Illinois, this day, and as a special consideration for the employment of me by said J. W. Sefton Manufacturing Company as a salesman, in accordance with a certain contract of employment made at Chicago this day, and for one dollar, and other good and valuable considerations, the receipt whereof I hereby acknowledge, I, Joseph J. Lanzit, of Chicago, Illinois, do hereby expressly covenant and agree as follows: That for the period of ten years from this third day of February, 1897, I will not, anywhere in the United States of America, directly or indirectly, either alone, or with any other person, firm or corporation, as employee, stockholder, officer, manager or otherwise, or in an advisory capacity, set up, follow or engage in the business of manufacturing, buying, selling, handling or dealing in paper receptacles, paper oyster pails, clothing boxes, folding paper boxes, or paper novelties of any kind or description whatsoever; nor will I furnish any other person, firm or corporation with any information relating to or concerning any of

said business." Then follows a paragraph identical with the last, except that the territory named, instead of the United States of America, is the State of Indiana; and this, in turn, is followed by a paragraph in which the territory named is the State of Illinois; and it, by a paragraph in which the territory named is Cook county, Illinois, after which is the following: "All the above restrictions are subject to the exceptions of my employment with the said J. W. Sefton Manufacturing Company, as per said contract of employment this date. In witness whereof, I have hereunto set my hand and seal at Chicago, Illinois, this third day of February, A. D. 1897. Jos. J. Lanzit. [Seal.] Fred. W. Job, Witness." The evidence shows that after Lanzit's term of employment, which was one year, had expired, he was employed by said Rentz Paper Company,—engaged, in part, in the same business in Illinois and Indiana as that carried on by appellee, and covered by the contract in question. But there is no allegation that said business was carried on in Cook county, or that appellant was engaged in any business covered by his contract in Cook county.

The only question for consideration is, were those provisions of the contract by which appellant agreed not to engage for 10 years in said business in Illinois, Indiana and the United States void, because in restraint of trade? As drawn, the contract is severable, and may, if within the scope of the bill, be enforced, as to any valid provision of it, as to the territory therein mentioned, and declared void as to other provisions found invalid. The bill alleged and the proof showed that appellee was an Indiana corporation, but authorized to do, and was doing, business in this State as well as in Indiana; that it manufactured and sold its goods mentioned in the contract in both States, and transacted its business, to a great extent, from its office in Chicago; and the prayer of the bill was that appellant be enjoined from violating his contract as to the States of Indiana and Illinois. It is too well settled to require discussion that contracts in general restraint of trade are void, as being against public policy. But contracts only in partial restraint of trade are valid and enforceable, if reasonable and supported by a consideration good in law. Linn v. Sigsbee, 67 Ill. 75; Hursen v. Gavin, 162 Ill. 377, 44 N. E. Rep. 735, and cases there cited. In Hursen v. Gavin, we said (page 380, 162 Ill. and page 735, 44 N. E. Rep.): "A contract in restraint of trade is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or State. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself, in the respects indicated, and is therefore against public policy." See also Harding v. Glucose Co., 182 Ill. 551, 55 N. E. Rep. 577; Wright v. Ryder, 36 Cal. 342. It is said, however, by appellee, that what was said in the Hursen case was not necessary to the decision, and should not be regarded as authority in a case where the question is directly involved. It is also argued that the strictness of the rule laid down in the early cases has been greatly relaxed, because of the different methods and increased facilities of communication and of transacting business, enabling the merchant or manufacturer to extend his trade over greater areas of territory than formerly was possible. Many cases are cited,—among them, Gibbs v. Gas Co., 130 U. S. 409, 9 Sup. Ct. Rep. 553, 32 L. Ed. 979; Tode v. Gross, 127 N. Y. 485, 28 N. E. Rep. 469, 13 L. R. A. 652; Match Co. v. Roeber, 106 N. Y. 477, 13 N. E. Rep. 419; Hodge v. Sloan, 107 N. Y. 248, 17 N. E. Rep. 335; Leslie v. Lorillard, 110 N. Y. 534, 18 N. E. Rep. 363, 1 L. R. A. 456, and Cowan v. Fairbrother (N. Car.), 24 S. E. Rep. 212, 32 L. R. A. 829. But all of these cases fully recognize the rule that the contract must be reasonable, under all the circumstances of the case, and not in general restraint of trade, and that whether it is so or not is a question to be determined by the court. Thus, in Navigation Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315, while the contract there involved was, by a divided court, held valid, it was said in the opinion of the court that it has generally been held that a contract not to exercise a trade in a particular State is invalid under the rule, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another State in order to pursue his avocation, but that in this country such a mode of applying the rule should be received with caution. And it was there, and also in Gibbs v. Gas Co., 130 U. S. 409, 9 Sup. Ct. Rep. 557, 32 L. Ed. 984, further said: "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general,—not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy."

The question is here presented whether said contract between appellant and appellee is or not reasonable and consistent with the public policy of the State. The record shows that appellant was, at the time of the making of the contract, engaged in said business in this State, and that, after his term of employment by appellee ended, he became employed by the Rentz Company, en-

gaged in this State, in part, in the same business. The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole State—of the industry and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business, or move to another State, in order to support himself and family; in other words, to expatriate himself, so far as his citizenship of this State extends, and go beyond our jurisdiction. Whether or not, under certain facts and circumstances, a valid contract might not be entered into not to engage in a specified business within the State, it is not necessary here to determine. As said above, "cases must be judged by circumstances." But we are of the opinion that a contract of the character, and tending to produce the effect, of the one under consideration, is, under all of the circumstances shown, unreasonable and against the public policy of this State. Albright v. Teas, 37 N. J. Eq. 171; Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. Rep. 1048; Machine Works v. Perry, 71 Wis. 495, 38 N. W. Rep. 82; Holmes v. Martin, 10 Ga. 503; Lange v. Werk, 2 Ohio St. 519; Keeler v. Taylor, 53 Pa. St. 467; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173. For the period of 10 years the restraint is total, when considered with reference to the limits of the State, and so far as our laws and the jurisdiction of our courts extend. Besides, business and trade in this country are not usually affected by State lines, and there is nothing in this case to make it appear that the boundaries of this State or of the State of Indiana, or of both of them combined, are the reasonable boundaries of the territory covered, or intended to be covered, by the business or trade mentioned in the contract, and necessary for the protection of appellee in his purchase from and contract with appellant. In the Hursen case we said, "Where the restriction embraces too large a territory, it will be unreasonable and void, as being wider than is necessary for the protection of the party in whose favor it is imposed." True, cases may arise—have arisen—where it would appear that even a greater extent of territory than a single State would not be wider than necessary for the protection of the covenantee from the competition intended to be guarded against. But this is not the only test of the validity of the contract. The interest and welfare of the public are of paramount importance. If a contract is in restraint of trade throughout an entire State, it may be void, as against public policy, although it may appear not to be unreasonable when considered merely with reference to the extent of the business of the covenantee, and the protection intended to be secured to him. If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, overruling all questions affecting the public welfare.

The decree enjoining appellant from engaging in said business in the States of Illinois and Indiana is erroneous, and should have been reversed by the appellate court. Whether so much of the contract as applies to Cook county only might not be enforced, it is unnecessary to determine, as there are no allegations in the bill to sustain such a decree. The judgment of the appellate court is reversed, and the cause remanded. Reversed and remanded.

NOTE.—*Recent Cases on Validity of Contracts in Restraint of Trade.*—A contract by which a person, for a valuable consideration, bound himself not to engage in a certain business in the city of Chicago for the term of five years, is within reasonable limitations, and may be enforced. Hursen v. Gavin, 59 Ill. App. 66. A contract by which defendant, formerly a dealer in oil in the city of H, agreed to refrain from following such occupation for five years within the State of Indiana, the city of Indianapolis excepted, is unreasonable and void as a restriction of trade. Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. Rep. 1048. In the sale by one partner of his interest in the partnership business to the other partner, an agreement on the part of the former not to engage in a rival business in the locality so long as the other remains in such business, is not invalid as unreasonable. O'Neal v. Hines (Ind. Sup.), 43 N. E. Rep. 946. An agreement to permanently cease selling buggies in a certain county is not void, as in restraint of trade. Davis v. Brown (Ky.), 32 S. W. Rep. 614. A covenant by a seller of an apothecary shop not to engage in the drug business within a certain distance thereof is not invalid because not limited as to time. Smith v. Brown, 164 Mass. 584, 42 N. E. Rep. 101. An agreement to refrain from engaging in a particular line of business cannot be avoided, as against public policy, by one who has received and retains a valuable consideration for it. National Wall-Paper Co. v. Hobbs, 90 Hun, 288, 35 N. Y. S. 932. A stipulation in a contract of employment that the employee would not, within three years after leaving the employer's services, engage in a similar business in any of 16 specified States, is unreasonable unless the act of the employee in engaging in such business in any of the States specified would actually prejudice the employer. Oppenheimer v. Hirsch, 38 N. Y. S. 311, 5 App. Div. 232. F and his wife sold a newspaper owned by them in D county, and agreed that F "shall not edit, print, or conduct a newspaper, nor be in anywise connected with one, printed anywhere in the State of North Carolina, and that, for a like period, Mrs. F shall not edit, print, or conduct a newspaper or magazine, nor be in anywise connected with one, anywhere in the county of D, said State, without the consent of such purchaser or his assignees." Held, that such contract was not void as an unreasonable restraint of trade. Cowan v. Fairbrother (N. Car.), 24 S. E. Rep 212. A contract between manufacturers, whereby, without sale of the business of one to the other, one party is prohibited from making certain articles, is an unreasonable restraint of trade. Fox Solid Pressed Steel Co. v. Schoen (C. C.), 77 Fed. Rep. 29. A "rebate voucher," promising to pay to a customer a certain sum in six months "to be valid and payable only" if during that time he bought all his goods from the dealer issuing it, is not against public policy. Olmstead v. Distilling & Cattle-Feeding Co. (C. C.), 77 Fed. Rep. 265. An agreement, made by one who enters the employ of the manufacturer of a medicine compounded by a secret process, not to make or sell

any of the medicine, or reveal the secret of its composition, is not in restraint of trade, and will be enforced in equity by injunction. C. F. Simmons Medicine Co. v. Simmons (C. C.), 81 Fed. Rep. 163. An agreement of a seller not to carry on a certain business, which is limited as to place, and is based on a sufficient consideration, is valid, though unlimited as to time. Swanson v. Kirby, 98 Ga. 586, 26 S. E. Rep. 71. A contract not to engage in the livery and undertaking business in the city of Chicago for five years is not invalid as in restraint of trade. Hursen v. Gavin, 162 Ill. 377, 44 N. E. Rep. 735. A contract of defendant to employ plaintiff if he would give up his business, and enter defendant's service in the same occupation, restrained plaintiff from engaging in business only while he was in defendant's employ, and accordingly was not in restraint of trade. Carnig v. Carr, 167 Mass. 544, 35 L. R. A. 512, 46 N. E. Rep. 117. A stipulation in a contract giving one the exclusive agency to sell another's goods for an indefinite period does not render the contract void as against public policy. Woods v. Hart (Neb.), 70 N. W. Rep. 53. A covenant by a seller of a manufacturing business not to engage in a similar business within 1,000 miles of the place in which it was located, was unreasonable where the business sold did not extend more than 100 miles, and there was nothing to show that such limit was necessary to protect it. Althen v. Vreeland (N. J. Ch.), 36 Atl. Rep. 479. A stipulation by vendors of mill property that they will not thereafter engage in the same business in the city in which the property is located is not invalid, as being in restraint of trade for an unreasonable length of time. Kramer v. Old, 119 N. Car. 1, 34 L. R. A. 389, 25 S. E. Rep. 813. There is no manifest unreasonableness in a contract whereby one agreed that he would not, after the termination of his employment with plaintiff, be concerned in the practice of dentistry in the county of such employment, which authorizes a court to declare it invalid. Tillinghast v. Boothby (R. I.), 37 Atl. Rep. 344. A contract of sale, whereby a brewing company grants exclusive territory to a dealer for the sale of its products, and agrees to furnish him a delivery wagon and ice vault, which are to remain its property, and the dealer agrees not to sell the product of any other company, is a combination in restraint of trade, as prohibited by Act March 30, 1889. Texas Brewing Co., v. Templeman (Tex. Sup.), 38 S. W. Rep. 27. A contract for the sale of beer, which provides that the purchaser shall handle only the beer named in the contract, and that the manufacturer shall sell to no other dealer in that town or vicinity, creates a trust and conspiracy against trade, within the prohibition of the act of 1889. Fuqua v. Pabst Brewing Co. (Tex.), 38 S. W. Rep. 29, 35 L. R. A. 241. A contract to sell an unlimited quantity of goods, prohibiting the vendee from dealing in the product of any other person, and requiring him to give prompt notice to the vendor of any competition in the sale of such goods at the place where the vendee does business, is void, under the anti-trust statute. Texas Brewing Co. v. Meyer (Tex. Civ. App.) 38 S. W. Rep. 263. A promise by a merchant to the purchaser of his stock, to retire from the mercantile business in that town for 12 months, is void under the statute forbidding conspiracies in restraint of trade. Gates v. Hooper (Tex. Civ. App.), 39 S. W. Rep. 186. A contract by the seller of a livery business not to engage in that business in the same city for five years, under the penalty of $10 for each day of breach thereof, is valid. Palmer v. Tomas (Wis.), 71 N. W. Rep. 654. The lessee of a dock, upon which he conducted the business of dealing in coal and fish, sold and conveyed certain real estate near by, on which was situated another dock, to a dealer in lumber, the purchaser entering into an agreement at the same time by which he bound himself in general terms not to engage in the coal or fish business for a term of years, or to "do anything that will conflict with the said coal or fish business" of the grantor. Held, that such agreement was limited as to locality to the dock situated on the property sold, and was valid. Hitchcock v. Anthony, 83 Fed. Rep. 779, 28 C. C. A. 80. A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade. Carter Crume Co. v. Peurrung (U. S. C. C. App.), 86 Fed. Rep. 439. The inhibition as to agency in a contract by a retiring partner not to carry on a like business either for himself or as agent is valid, under Civ. Code sec. 1675, providing that a partner, upon a dissolution, may agree to refrain from "carrying on a similar business" in a limited territory. Meyers v. Merrillion, 118 Cal. 352, 50 Pac. Rep 662. An agreement by officers of three separate corporations engaged in manufacturing and dealing in electric goods, who became officers of a new corporation, which purchased the interest and good will of the others, not to engage in a like business or compete in any manner for a period of five years, unless upon withdrawing from such corporation if put at a disadvantage in reference to salary, is not such a contract in restraint of trade as is void as against public policy. Anchor Electric Co. v. Hawkes (Mass.), 50 N. E. Rep. 509. A condition of a contract of employment that the servant will never make use of or divulge trade secrets necessarily confided to him by the master in the conduct of the business is not invalid as being in restraint of trade. O. & W. Thum Co. v. Tloczynski (Mich.), 72 N. W. Rep. 140, 38 L. R. A. 200. Where the seller of stock in an ice company doing an ice business at P, agreed with the purchaser not to engage in the ice business at P, nor adjacent thereto, at any time, the agreement was not an unreasonable restraint of trade, and void as against public policy. Up River Ice Co. v. Denler (Mich.), 72 N. W. Rep. 157. The intention of the purchaser of a factory to produce only one of several classes of goods for which it was used does not make a covenant with the vendor unreasonable, which restrains him from competition in the manufacture of all the classes of articles which the factory could produce. Trenton Potteries Co. v. Oliphant (N. J. Ch.), 39 Atl. Rep. 923. An agreement by a vendor, who has sold out to a competitor, not to engage in the same business in the State nor in the United States for 25 years, is void, as in restraint of trade. Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N. E. Rep. 1030. An agreement by a merchant not to engage in the same business in a specified city for two years is not void, as in violation of the trust law of Texas or as against trade. Erwin v. Hayden (Tex. Civ. App.), 43 S. W. Rep. 610. A distinction exists between contracts binding one to desist from the practice of a learned profession, and those which bind one who has sold out to a mercantile or other kind of business, not to again engage in that business. In the former class there should be a reasonable limit as to time. In the latter class such limit is not essential to the validity of the contract, but the restraint may be indefinite. Rakestraw v. Lanier (Ga.), 30 S.E . Rep. 735. A contract for the formation of a medical partnership to continue for twelve months, but which might be dissolved by either of its two members on 30 days' notice to the other, whereby one of them

stipulates that, in the event said firm shall at any time be dissolved, he will not locate or engage in the practice of medicine at a named town, or at any place within fifteen miles radius of a specified drug store therein, is unreasonable and should not be enforced. Rakestraw v. Lanier (Ga.), 30 S. E. Rep. 735. On the question of compensation for condemnation of a right of way for a telegraph line along a railroad right of way, it cannot be shown what rent was stipulated in a lease by the railroad company to another telegraph company giving it exclusive use of the railroad right of way; such lease being void as in restraint of trade and creating a monopoly. St. Louis & C. R. Co. v. Postal Tel. Co. of Illinois, 173 Ill. 508, 51 N. E. Rep. 382. A contract to sell lambs, wherein the buyer agrees not to purchase any lambs in certain towns prior to the agreed date of delivery, is void, under 3 How. Ann. St. sec. 9354, making void all contracts containing an agreement to restrict free competition in the production or sale of any commodity produced by agriculture. Bingham v. Brands (Mich.), 77 N. W. Rep. 940.

BOOK REVIEWS.

COMMON REMEDIAL PROCESSES,

Treating of the means by which judgments are enforced; and principally of attachment, garnishment, executions and replevin; and incidentally of the judgments enforced, the nature, essentials, record and satisfaction of them. The author, John R. Rood, has heretofore written a treatise on the Law of Garnishment, and is an instructor in the law department of the University of Michigan. This work has been prepared especially for students, and is the result of an attempt to prepare a course of study on the general principles of the law of judgments and the means of enforcing them. The author says that in view of the great practical importance of this branch of the law, it is surprising that no previous attempts have heretofore been made in this direction for the use of students. The book treats of legislative control of remedial processes; on what judgments and in what actions the processes are available; at what stage of the cause the processes are available, to whom and against whom they are available; what courts may issue the processes; execution of the processes, where, when, by whom and how it should be made, and what may be taken under the process; character of the creditor's lien, or right under the processes; the rule of priority or when the lien attaches, and how the lien may be lost. This book contains 360 pages, issued in two bindings, buckram and leather. Published by George Wahr, Ann Arbor, Michigan.

BOOKS RECEIVED.

Cases on Private International Law. By John W. Dwyer, LL.M., Instructor of Law in the Department of Law of the University of Michigan. Published by George Wahr, Ann Arbor. pp. 509. Buckram. Price, $2.50. Review will follow.

HUMORS OF THE LAW.

The following letter was received by an Atlanta bookseller recently: "Dear Sur: Will you pleas sen Me a Kode of Georger, so I kin know how to practis the law I been studyin all winter? I want to be Rite when I git up in Cort for my kliants which come to my Pertecshun; so I want a Kode of Georger, in big Type, so I kin spell my way through without Trubble. So, please sen me a Kode of Georger."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT STATED — Settlement.—A settlement of account between parties covering all grounds of difference between them arising out of claims for labor and materials under a contract, in which notes are given for the balance remaining due, is binding upon them, and cannot be afterwards repudiated, and suit brought on the original claim, except on proof of fraud or mistake, or that it was expressly agreed that some of the matters were left open for future adjustment.—MCCORMICK V. INTERSTATE CONSOL. RAPID TRANSIT RY. CO., Mo., 55 S. W. Rep. 252.

2. APPEAL—Substitution of Claim.—On appeal from a judgment of the probate court on a guardian's final accounting, allowing a ward the value of property of which the guardian had made an attempted sale without order of court, and without having given the ward any of the proceeds, the circuit court, having found the sale void, did not err in allowing the basis of the account to be changed to a charge for rent, since, the matter before the probate court being a final accounting, the whole claim was properly before the circuit court on appeal.—CUMMIN V. BALDWIN, Mich., 81 N. W. Rep. 917.

3. APPEAL FROM JUSTICE COURT — Bond.—Where defendant have no adverse interests as against each other, a bond on appeal by one defendant against whom judgment was rendered need not be made payable to a co-defendant in whose favor judgment was rendered.—CROSS V. MOORES, Tex., 55 S. W. Rep. 378.

4. ATTORNEY AND CLIENT—Partnership.—In an action against a firm of attorneys to recover money alleged to have been collected by defendants for plaintiff, as it was proved that one of the defendants had collected the money, and there was testimony tending to show that he had done so under employment as a member of the firm, and not under a personal employment, it was error to give a peremptory instruction for defend-

ants.—WELLENBROCK v. SPEKERT, Ky., 55 S. W. Rep. 200.

5. BENEVOLENT SOCIETY—Insurance Contract.—Insured, while in good health, applied for insurance in a benefit association, and paid the requisite amounts therefor. The application was approved, a certificate issued, and sen to the local agent, who delivered it while insured was very ill with malarial fever, of which she died the next day. The agent acted with full knowledge of all the facts, and there was no fraud on the part of the insured or the beneficiary. Held, that the association was liable on the certificate, though the delivery to the insured while sick was contrary to its by laws.—HOME FORUM BEN. ORDER v. VARNADO, Tex., 55 S. W. Rep. 364.

6. BILLS AND NOTES—Bona Fide Purchaser.—A is not a *bona fide* purchaser of a note and a mortgage securing it, because before he received them they had been used as collateral with a bank which was an innocent holder; possession having been regained by the person who used them with the bank, and who was not an innocent holder, and he having sold them to A after maturity.—BOOHER v. ALLEN, Mo., 55 S. W. Rep. 238.

7. BILLS AND NOTES—Extension—Consideration—Release of Surety.—A payee of a note discharges the surety by agreeing with the principal, without the surety's knowledge or consent, to extend the time of payment in consideration of a payment of interest in advance.—STONE'S RIVER NAT. BANK v. WALTER, Tenn., 55 S. W. Rep. 301.

8. BOUNDARIES — Patent Calls.—The calls of a patent to land must give way to marked lines and corners found on the ground.—KANT v. RICE, Ky., 55 S. W. Rep. 203.

9. BUILDING ASSOCIATIONS — Taxation — Constitutional Law.—When, by the terms of an act, the president of a building and loan association is required to return to the tax receiver of the county where such association is located, at its true market value, the stock owned by the stockholders thereof upon which no advance has been made, the tax so imposed is not a tax against the corporation, but is against the property of the individual holders, and is a plan adopted by the legislature to conveniently reach this class of stock in the hands of the owner, and is not imposed as a franchise, but a property tax. (a) When the same act provides that the taxes so required shall be in lieu of all other taxes and licenses, whether State, county, or municipal, against said associations, except a business license, the latter provision is inoperative and void, and is in violation of the constitutional provision requiring all taxation to be uniform and *ad valorem*.—GEORGIA STATE BLDG. & LOAN ASSN. OF SAVANNAH v. MAYOR, ETC. OF SAVANNAH, Ga., 35 S. E. Rep. 67.

10. CARRIERS—Contract Limiting Liability.—Notwithstanding Rev. St. Ill. 1889, ch. 114, § 82, declaring it unlawful for a carrier, on receiving property for transportation, to limit its common law liability for safe delivery by any stipulation of limitation in its receipt for the property, a contract signed by the shipper, providing that, in consideration of the lower rate of freight, his recovery, in case of damage, shall be limited to $100 for each horse shipped, is binding on him, he knowing of the provision, though the railroad clerk told him the clause "did not amount to anything," and was "only a matter of form," such statement not being within the line of the servant's duties, and the contract informing the shipper of the two rates, that the lower was in consideration of the limited liability, that the shipper could be bound only by written contract, and that a special contract could only be made by a general officer.—JENNINGS v. SMITH, U. S. C. C., N. D. (Ill.), 99 Fed. Rep. 189.

11. CARRIERS—Freight—Bills of Lading.—Under a bill of lading providing that the carrier shall not be responsible for loss or damage to property unless notice thereof is given to the delivering carrier "within thirty hours after delivery," a railroad company is not liable for loss or damage to freight unless such notice is given, if the time allowed the shipper is sufficient, under the circumstances, with reasonable diligence, to discover the damage, and give notice.—ST. LOUIS, ETC. R. CO. v. HURST, Ark., 55 S. W. Rep. 215.

12. CARRIERS — Injury of Passenger at Station.—If a passenger on a railroad train alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company, it is necessary to cross intervening tracks, he remains a passenger until he has crossed such tracks, provided he uses the means of egress which the company has provided, or which is customarily used with its knowledge and consent; and there is an implied agreement that the trains of the company shall not be so operated as to make the exit unnecessarily dangerous.—CHESAPEAKE & O. RY. CO. v. KING, U. S. C. C. of App., Sixth Circuit, 99 Fed. Rep. 251.

13. CARRIERS OF PASSENGERS—Conditions of Tickets.—The conductor of a railroad train has no authority to bind the company, by allowing a stop-over, so as to make the company liable, where a connecting road ejected the passenger because the ticket provided for a continuous trip on the two roads.—INTERNATIONAL, ETC. R. CO. v. BEST, Tex., 55 S. W. Rep. 315.

14. CHATTEL MORTGAGE—Injunction.—A conveyance of goods and chattels, absolute on its face, but in reality made to secure a debt, is in equity a mortgage, and, to be good as to creditors, must be recorded. An injunction will not lie against the sale of goods and chattels attached, claimed by a third party, unless they are of peculiar value to the owner, and it is clearly shown and manifestly appears that great injury would result to the owner from consequential damages from the sale, because the owner has complete and adequate remedy at law.—ZANHIZER v. HEFNER, W. Va., 35 S. W. Rep. 4.

15. CONSTITUTIONAL LAW—Mortgages — Foreclosure.—Pub. Acts 1899, No. 200, providing that a decree of foreclosure shall not direct a sale until after six months from the filing of the bill, instead of after one year, as formerly provided by How. Ann. St. § 6701, and giving, in addition, a right of redemption for six months after sale, simply changes the form of the decree, and does not so affect the rights of the mortgagee as to preclude its application to the foreclosure of a mortgage executed prior to its enactment, as impairing the obligation of contracts.—STATE SAV. BANK v. MATHEWS, Mich., 81 N. W. Rep. 918.

16. CONSTITUTIONAL LAW—Taxation—Uniformity.—A tax imposed by a municipal corporation on the gross premiums of an insurance company doing business in the city where the tax is imposed is not a property tax, in the sense of the constitution, so as to require the *ad valorem* system to be applied. While, by a municipal ordinance, a tax on the gross premiums of an insurance company doing business in the city, at a given rate per cent., may be lawfully imposed, if the authority to do so be clearly given, an ordinance which by its terms only imposes such tax on non-resident companies, and expressly excludes resident companies from its operation, is void for the want of the uniformity required by the constitution.—MUTUAL RESERVE FUND LIFE ASSN. v. CITY COUNCIL OF AUGUSTA, Ga., 35 S. E. Rep. 71.

17. CONTRACT—Assignment—Interest.—Where plaintiff assigned a mortgage to defendant on his agreement to pay plaintiff accumulated interest out of the first interest that should be paid on the debt, and defendant was compelled to foreclose the mortgage for non payment of interest, and realized less than the principal sum due, plaintiff was not entitled to recover such back interest.—COLLINS v. GORDON, Mich., 81 N. W. Rep. 935.

18. CONTRACTS—Breach — Agreement to Arbitrate.—The parties to a contract cannot oust the courts of jurisdiction of an action for breach of an express contract by incorporating in it an agreement that any dispute which may arise thereunder shall be submitted toarbitration.—ISON v. WRIGHT, Ky., 55 S. W. Rep. 202.

19. CONTRACT—Fraud as Defense.—That the maker of a plain and unambiguous written contract with a corporation was induced to execute the same by false and fraudulent representations as to its methods of doing business and as to the probable results of the transaction evidenced by such contract, is not a valid defense to an action thereon, when there is nothing to show that the maker was misled or deceived as to its contents, or in any manner prevented from ascertaining the same.—ANGIER v. EQUITABLE BLDG. & LOAN ASSN., Ga., 35 S. E. Rep. 64.

20. CORPORATIONS—Contracts of Promoters.—Where a corporation accepted the benefit of a promoter's agreement to pay plaintiff certain unpaid rent of the corporation's predecessors, if permitted to occupy plaintiff's building, and on the corporation's coming into existence the promoter was elected as president, and the company took possession of the building, it was charged with the president's knowledge respecting the agreement, and bound thereby.—CHASE v. REDFIELD CREAMERY CO., S. Dak., 81 N. W. Rep. 951.

21. CORPORATIONS — Cumulative Voting — Election of Directors.—In the election of directors of a corporation, the cumulative voting of shares is authorized by section 3245, Rev. St., as amended April 23, 1898 (93 Ohio Laws, p. 230), and one receiving a majority of the votes so cast is elected director, though he does not receive the votes of the holders of a majority of the shares.—SCHWARZ v. STATE, Ohio, 56 N. E. Rep. 201.

22. CORPORATIONS — Fraudulent Conveyances. — A conveyance by a non-resident corporation of chattels in the State in trust for the benefit of certain creditors is valid, as against non-resident creditors, where it is executed in the State of the corporation's residence, and is valid in such State, and the conveyance is registered in the county where the property is located, before it is assailed by such non-resident creditors.—PARKS BROS. & CO. v. BEARCH-CROOKES SAW CO., Tenn., 55 S. W. Rep. 305.

23. CORPORATION—Parties—Suit to Recover Assets. —In a suit in equity by stockholders of a corporation to compel restitution to such corporation of assets alleged to have been fraudulently transferred, and to be in the possession of defendants, the person by or through whom the transfer was made are not necessary parties, nor is one who holds certain of such assets as depositary merely, subject to the orders of defendants.—ELDRED v. AMERICAN PALACE CAR CO., OF N. J., U. S. C. C. (N. J.), 99 Fed. Rep. 168.

24. COURTS — Jurisdiction — Consent.— Consent of parties cannot confer upon a court juisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person.—YATES v. TAYLOR COUNTY COURT, W. Va., 35 S. E. Rep. 24.

25. CRIMINAL LAW — Assault with Intent to Murder.—Evidence that the parties to an assault were Finns, whose custom it was to enter one another's houses without knocking, and that defendant, having had some trouble with the family living on the floor below him, on hearing the prosecuting witness ascending the stairs, supposed it was one of the parties below, and struck him in the face with an axe on his entering defendant's premises to inquire the cause of the disturbance, is sufficient to support a verdict for assault with intent to do great bodily harm.—PEOPLE v. KALUNKI, Mich., 81 N. W. Rep. 923.

26. CRIMINAL LAW — Embezzlement — Gambling. — Since a memorandum signed by defendant, and stating that he had bought through certain parties an amount of wheat for another, is incomplete and not within the statute of frauds, parol evidence is admissible for the purpose of supplying the omitted parts.—STATE v. CUNNINGHAM, Mo., 55 S. W. Rep. 282.

27. CRIMINAL LAW—Embezzlement by Public Officer. —In order to convict a public officer for the offense o embezzlement, all the elements necessary to constitute the crime must be proven—among others, the fact that the accused fraudulently appropriated to his own use public funds which went into his hands as an officer. While positive proof of such approriation is not required, and as a general rule may be legitimately inferred from the acts of the accused, yet a mere failure to pay over the amount with which such officer is chargeable is not of itself, alone, sufficient to establish a fraudulent appropriation to his own use.—ROBINSON v. STATE, Ga., 35 S. E. Rep. 57.

28. CRIMINAL LAW—Homicide.—Where the issues of self-defense, accidental shooting, and death resulting from the improper treatment of the wound are submitted to the jury on a trial for homicide, it was prejudicial error to instruct that where a person, inflicting an injury which makes it necessary to call aid to preserve life, willfully fails to call such aid, he is equally guilty as if the injury were one which would inevitably lead to death, without evidence that accused willfully neglected deceased.—WARE v. STATE, Tex., 55 S. W. Rep. 342.

29. CRIMINAL LAW—Homicide—Excusable Homicide. —The owner or occupier of a store or place of business need not retreat, if assaulted therein, but may, after the refusal of the trespasser to leave upon request, employ such force, short of inflicting death, as may be necessary to remove him from the building, and, if death results from a blow given under such provocation, the killing may be reduced to manslaughter.—STATE v. REED, Mo., 55 S. W. Rep. 279.

30. CRIMINAL LAW—Homicide—Manslaughter.—On a plea of self-defense, evidence of the violent character of the deceased, if known by the defendant or communicated to him prior to the killing, is admissible to explain the condition of defendant's mind at the time of the homicide.—SPANGLER v. STATE, Tex., 55 S. W. Rep. 326.

31. CRIMINAL LAW—Homicide — Insanity as Defense. —A person who, by association and observation, has had an opportunity to form an opinion as to the sanity of accused, may, though not an expert, testify to that opinion, giving the facts on which the opinion is based. —ABBOTT v. COMMONWEALTH, Ky., 55 S. W. Rep. 196.

32. CRIMINAL LAW — Riot — Indictment.—An indictment alleging that certain named persons "did, in a violent and tumultuous manner, prevent the sheriff from removing from the common jail" a prisoner therein confined, sufficiently charges the offense of riot, as against a special demurrer setting up that the indictment did "not allege any act, done in a violent and tumultuous manner, which prevented" the sheriff from removing the prisoner. *Aliter*, if the point had been made that the act charged was not set forth with sufficient particularity.—GREEN v. STATE, Ga., 35 S. E. Rep. 97.

33. CRIMINAL LAW — Train Robbery — Presence of Party Robbed.—In a prosecution for train robbery, under Act April 2, 1895, the indictment alleged that the robbery was committed "in the presence and against the will" of the express agent, and by violence. The evidence showed that the robbers forcibly entered the express car, and ejected the express agent by violence, and then cut the train into two parts, and moved the forward portion west about a quarter of a mile, and there blew open the safe. Held, that there was a taking by force and violence, in contemplation of law, within the presence of the agent, though he was not actually present when the safe was broken open.—STATE v. KENNEDY, Mo., 55 S. W. Rep. 293.

34. DAMAGES—Mental Anguish.—Damages for mental anguish for being delayed, after purchase of ticket, in reaching one's family by failure of station agent to stop a train, cannot be recovered where the facts as to plaintiff's family and their condition and his anxiety to be with them were not made known to the agent at the time the ticket was purchased.—JONES v. TEXAS, ETC. R. CO., Tex., 55 S. W. Rep. 371.

35. DEEDS — Action to Set Aside.—Where one having an interest in lands conveys the same by quitclaim deed, under a parol agreement that the grantee shall institute proceedings to perfect the title for the grantor, the latter cannot, upon a breach of such agreement, recover the land, as against an innocent purchaser thereof for value.—KESLER v. JOHNSON, Mich., 81 N. W. Rep. 922.

36. DEED—Cancellation.—Where plaintiff was the owner and in possession of a tract of land, and B, while occupying a small portion thereof, was fraudulently induced to execute a deed of the entire tract to defendants, plaintiff could not maintain a suit for the cancellation of the deed, since B had a right to convey any interest he believed he possessed, and the deed was between third parties, and deprived plaintiff of no right.—HANNIBAL & ST. J. R. CO. v. NORTONI, Mo., 55 S. W. Rep. 220.

37. DEEDS—Construction.—A deed recited that the grantor, in consideration of love and affection, gave a certain plantation to his sister and her children, and that he warranted the title, and appointed one P and himself as trustees to take care of the land until the children became of age. Held to convey the fee, and on the death of their mother the children became the legal owners of the property, and the same did not revert to the grantor.—LEE v. MILES, S. Car., 35 S. E. Rep. 2.

38. DEED OF TRUST — Consideration.—H having incurred a contingent liability to D on covenants of seisin and warranty in a deed of H to D, and there being pending an action of ejectment against D for the land conveyed thereby, by one claiming superior title, H, being insolvent, agreed with D, if he would forbear to assert the title acquired by him from her as a defense therein, whereby her contingent liability on the covenants might become absolute, and the measure of damages for a breach thereof fixed, and instead would interpose as a defense an outstanding title in another, a life estate, she would give him a deed of trust to secure him against loss in case the title given by H was thereafter declared invalid, and D agreed thereto, and performed his part of the agreement, and H gave the deed of trust. Held, that H, having enjoyed the benefits of the executed contract, could not, on becoming insolvent, have the deed of trust set aside as without consideration.—HALL v. DOUTHETT, Mo., 55 S. W. Rep. 208.

39. DOWER—Admeasurement.—Where a wife joins in a fraudulent conveyance of her husband's land, and it is afterwards set aside, she is entitled to dower in the land if she was not a party to the fraud, and received no consideration for signing the deed.—WELLS v. ESTES, Mo., 55 S. W. Rep. 255.

40. DOWER — Relinquishment.—Under Rev. St. 1889, § 4525, declaring that no act of the husband shall bar the dower of the wife without her consent, the wife's acceptance of a conveyance of land to her in fee, the deed containing no provision that it is in lieu of dower in other lands, is not a relinquishment of her dower in such lands.—BEALEY v. BLAKE, Mo., 55 S. W. Rep. 288.

41. EJECTMENT — Outstanding Title.—A deed passing title to the grantee therein named, for the purpose of securing a debt, can, after the maturity of the debt, be set up as outstanding title to defeat an action of ejectment brought by one claiming under the grantor, if the possession of the defendant is connected with such title.—ASHLEY v. COOK, Ga., 35 S. E. Rep. 89.

42. ELECTIONS — Indorsements and Distinguishing Marks on Ballots.—A ballot is not void because of indorsements or distinguishing marks made upon it by election officers after it has been prepared by the voter and delivered to the judges for deposit in the ballot box.—GILL v. SHURTLEFF, Ill., 56 N. E. Rep. 164.

43. ELECTION OF REMEDIES—Executory Contracts of Sale.—Foreclosure of a purchase money mortgage given on the execution of a deed conveying the legal title to mortgagor, and a sale of a portion of the land under the decree, deprive the vendor of the legal title to the land not sold, and vest it in the vendee.—GARDENER v. GRIFFITH, Tex., 55 S. W. Rep. 314.

44. EVIDENCE — Testimony of Deceased Witness—Action.—Testimony in an action by an infant claiming damages for his pain and suffering from an injury is not admissible (the witness having died in the meantime) in a subsequent action against the same defendant by the infant's mother, claiming damages for loss of his services; there being no privity between the plaintiffs.—METROPOLITAN ST. RY. CO. v. GUMBY, U. S. C. C. of App., Second Circuit, 99 Fed. Rep. 192.

45. EXECUTORS AND ADMINISTRATORS—Settlement of Accounts.—When the principal defendant in a chancery cause dies, and the same is revived against his administrator, heirs, sureties, creditors, grantees, and donees, and converted into a general creditors' bill for the purpose of settling the estate of such decedent, an unconfirmed commissioner's report, to which numerous exceptions have been filed, cannot be confirmed against the objection of any of such new and interested parties to the suit, but the same should be recommitted anew without regard to such unconfirmed report.—HOLT v. HOLT, W. Va., 35 S. E. Rep. 19.

46. FEDERAL COURTS — Following State Decisions.—The decision of the highest court of a State, construing a State statute, or determining whether or not a statute has been repealed by a subsequent act, will be recognized as authoritative by a federal court, subject to certain exceptions as where prior acquired rights are affected; and, where such court has independently rendered a contrary decision, it will be recalled, if still within the court's control, in deference to a later decision of the State court.—SOUTHERN RY. CO. v. NORTH CAROLINA CORP. COMMISSION, U. S. C. C., E. D. (N. Car.), 99 Fed. Rep. 162.

47. FEDERAL COURTS — Jurisdiction — Federal Question.—A suit in equity to determine the ownership of a patent claimed by both parties under assignments from the patentee is not one arising under the patent laws of the United States, so as to give a federal court jurisdiction where the parties are citizens of the same State.—ATHERTON MACH. CO. v. ATWOOD-MORRISON CO., U. S. C. C., D. (N. J.), 99 Fed. Rep. 113.

48. FRAUDULENT CONVEYANCES—Intent of Grantee.—Where personal property is transferred to a creditor in settlement of an indebtedness due from an insolvent debtor, if the debt is *bona fide*, and no more property is received than is reasonably necessary to satisfy the same, the transfer will not be invalid because of an intention on the part of the creditor to thereby aid the debtor in hindering and delaying other creditors.—GARRITTY v. RANKIN, Tex., 55 S. W. Rep. 367.

49. GAMBLING—Recovery of Money — Action.—Under Rev. St. § 5209, permitting one losing money at gambling to recover it by action, and section 5210, giving the loser's creditors the same remedy against the winner, the loser is not a necessary party to the action by the creditors, but, they having recovered the money, he cannot maintain another action therefor against the winner.—COFER v. RISELING, Mo., 55 S. W. Rep. 235.

50. GAMING—Notice to Stakeholder.—Under Ky. St. § 1959, providing that the stakeholder of any money staked on a bet or wager "shall when thereto notified return the same to the person making the stake or deposit, and for failing to do so the amount or value of the stake may be recovered from him by the party aggrieved," the stakeholder is liable to the loser if he pays over the money to the winner after notice from the loser not to do so; notice to return the money to the loser not being necessary.—TURNER v. THOMPSON, Ky., 55 S. W. Rep. 210.

51. GUARANTY.—A guaranty by a seller, to one who purchases for the purpose of reselling, to maintain for a specified season the price of the goods sold, is not applicable, when it appears that the buyer did not himself sell or dispose of the goods during that season.—ATLANTA CONSOL. BOTTLING CO. v. HUTCHINSON, Ga., 35 S. E. Rep. 124.

52. GUARANTY—Parol Promise.—Where, immediately after executing a written contract guarantying, to an amount stated, payments for goods to be ordered by a partnership, the guarantor made a parol promise to pay for all goods so ordered, and subsequently wrote letters to the other party to the written contract containing promises to pay an indebtedness of the partnership, the nature and extent of which was not in such letters explicitly stated, evidence of the parol promise was admissible for the purpose of explaining the true intent and meaning of the letters.—STERLING CYCLE WORKS v. WILLINGHAM, Ga., 35 S. E. Rep. 55.

53. HOMESTEAD—Exemptions—Descent and Distribution.—Under Const. art. 16, and Rev. St. arts. 2046, 2055, providing that upon the death of a head of a family, leaving a widow and minor children, the county court shall set aside the homestead and other exempt property to such widow and children, who are entitled to the use of the homestead, but that the title to the property shall vest in all the heirs, the mother and sister of deceased, who were dependent on him, and constituted his sole family, are not entitled to any of his homestead or exemption rights as against creditors.—ROOTS v. ROBERTSON, Tex., 55 S. W. Rep. 308.

54. INJUNCTION—Trespass on Oil Land.—It is a general rule not to continue a motion to dissolve an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so; and because, too, the plaintiff should always be ready to prove his bill.—STEELSMITH v. FISHER OIL CO., W. Va., 35 S. E. Rep. 15.

55. LANDLORD AND TENANT — Payment of Rent — Giving of Note.—Where a lease provided that the lessee should execute his note for the amount of the rent, and should also pay the taxes on the land, "as additional rent," the execution of the note constitutes payment of the rent, so far as relates to the rights of the parties under the lease.—MULLIGAN v. HOLLINGSWORTH, U. S. C. C., W. D. (Mo.), 99 Fed. Rep. 216.

56. LIFE INSURANCE — Vested Interest in Beneficiary.—The taking out of a policy of life insurance creates no vested interest in the beneficiary named therein, where the policy permits a change of beneficiaries by agreement between insured and insurer, without the knowledge or consent of the beneficiary.—HOPKINS v. NORTHWESTERN LIFE ASSUR. CO., U. S. C. C. of App., Third Circuit, 99 Fed. Rep. 199.

57. LIMITATIONS—Demurrer.—To warrant the sustaining of a demurrer to a petition on the ground that the cause of action is barred by the statute of limitations, the petition must show on its face that the whole cause of action is so barred. If the petition is silent as to time, as to any separable part of the cause of action, the demurrer should be overruled.—OSBORN v. PORTSMOUTH NAT. BANK, Ohio, 56 N. E. Rep. 197.

58. MALICIOUS PROSECUTION — Evidence. — That a prosecution by a landlord of a cropper for selling cotton before paying in full for advances received from the former to aid in making the cotton was instituted in good faith, and upon probable cause, could not be shown by proving that shortly after beginning the prosecution the landlord obtained against the cropper, in a civil action, a judgment which must necessarily have been based upon claims not constituting such advances; and the more especially is this so when all the facts and circumstances in proof tended to show that the main, if not the only, object of the prosecution was to affect the result of the civil proceeding.—BARGE v. WEEMS, Ga., 35 S. E. Rep. 65.

59. MASTER AND SERVANT—Action for Injury to Servant—Evidence.—In an action by a servant against the master to recover for a personal injury caused by his clothing being caught in machinery while in the performance of a duty directed by the master, it is not error to permit an engineer, who was familiar with the machinery, and who reached plaintiff immediately after the injury, to testify as to the probable manner in which the accident occurred. — NEIDLINGER v. YOOST, U. S. C. C. of App., Second Circuit, 99 Fed. Rep. 240.

60. MASTER AND SERVANT— Injury to Employee.—When a servant sues his master for damages from injuries caused by the negligence of the latter, plaintiff must prove defendant's negligence. Proof of accident and injury alone are not sufficient to authorize a recovery.—MISSOURI, K. & T. RY. CO. OF TEXAS v. CROWDER, Tex., 55 S. W. Rep. 380.

61. MASTER AND SERVANT—Injury to Employee—Negligence.—An instruction that ordinary care is such as an "ordinary prudent person" would exercise under like circumstances is not ground for the reversal of a judgment because of the use of the word "ordinary" instead of "ordinarily," in connection with "prudent person," where it does not appear that the jury were misled.—SAN ANTONIO GAS CO. v. ROBERTSON, Tex., 55 S. W. Rep 347.

62. MASTER AND SERVANT—Injury to Employee—Release of Damages.—A contract between an employee and his master, or another acting in the latter's interest, by the terms of which the employee, when physically injured, whether as a result of his own negligence or not, or when sick, is to receive pecuniary and other valuable benefits, and which stipulates that his voluntary acceptance of any of such benefits in case of injury is to operate as a release of the master from all liability on account thereof, is not contrary to public policy.—PETTY v. BRUNSWICK & W. RY. CO., Ga., 35 S. E. Rep. 82.

63. MASTER AND SERVANT—Negligence of Vice-Principal.—It being for M, foreman of the work of clearing, repairing and inspecting cars, to determine, in the exercise of his duties as vice-principal, what cars should be brought in on the clearing, repairing and inspecting track, when they should be brought, and where they should be placed, any negligence of his in causing the bringing in of cars on such tracks, without warning to deceased, whom he had directed to engage in work under a car on the track, is his as vice-principal, and not as fellow-servant, though he himself brings in the cars.—METROPOLITAN WEST SIDE EL. R. CO. v. SKOLA, Ill., 56 N. E. Rep. 171.

64. MECHANICS' LIENS—Assignment of Claim.—A subcontractor's order, given to a third person, directing the owner of a building in construction to pay to him all sums due or to become due under the subcontractor's contract, not being an absolute assignment to the holder of all the contractor's indebtedness to the subcontractor, though accepted by the contractor and owner, the subcontractor has such an interest remaining in his account as enables him to file a mechanic's lien for material furnished. — ITTNER v. HUGHES, Mo., 55 S. W. Rep. 267.

65. MECHANIC'S LIEN—Action—Extent of Lien—Sufficiency of Description.—A subcontractor who furnished an engine which was placed in one of a number of separate buildings previously built, and constituting a packing plant, and which was used only in the manufacture of ice in such building, is not entitled, under the mechanic's lien statute of Missouri, to a lien upon the other buildings of the plant; and where his notice of lien claims a lien upon all, and does not contain a sufficient description to identify the building in which the engine was placed and used, the lien cannot be enforced, even as against such building.—HOOVEN, OWENS & RENTSCHLER CO. v. FEATHERSTONE, U. S. C. C., W. D. (Mo.), 99 Fed. Rep. 180.

66. MORTGAGE—Deed of Trust—Foreclosure Sale.—In an action to recover the price, a sheriff's memorandum of sale in proceedings to foreclose a deed of trust by sale is not admissible till it is shown that the trustee refused to act; the deed of trust merely providing that, if the trustee refused to act, then the sheriff might proceed to foreclose by sale.—DUNHAM v. HARTMAN, Mo., 55 S. W. Rep. 233.

67. MORTGAGE—Trust Deed — Release — Delivery. — That there is no manual delivery of a release of a deed

of trust is immaterial, where the trustee told the makers of said deed that he would get and attend to the release, and they gave him the money for recording it, and he got and recorded it.—MANN v. JUMMEL, Ill., 56 N. E. Rep. 161.

68. MUNICIPAL BONDS—Estoppel by Recitals.—A recital in negotiable bonds issued by the board of directors of an irrigation district in California under the power conferred by Act March 7, 1885, that such bonds were issued "by authority of, and pursuant to, and after a full compliance with all the requirements of" said act, estops the district, as against *bona fide* purchasers of such bonds, from asserting that no estimate or determination of the amount of money necessary to be raised by issuing bonds was made by the board, as required by the act, or that the bonds were disposed of in a manner or for considerations other than those prescribed by the act.—MILLER v. PERRIS IRR. DIST., U. S. C. C., S. D. (Cal.), 99 Fed. Rep. 148.

69. MUNICIPAL CORPORATIONS—Defective Crossing.—Where plaintiff, acquainted with the condition of a wooden sidewalk crossing a dirt road in a city, alleged that she was injured by the city's negligence in permitting mud and water to remain on the crossing, but made no claim of negligence in allowing snow and ice to remain thereon, and it appeared that the city had allowed mud to accumulate on the crossing to the depth of shoe tops in wet weather, and that at the time plaintiff was injured the crossing was also covered with slush, which had frozen and thawed thereon, and plaintiff was injured while attempting to cross in the daytime, the direction of a nonsuit was proper.—WARREN v. CITY OF INDEPENDENCE, Mo., 55 S. W. Rep. 227.

70. MUNICIPAL CORPORATIONS—License—Ordinance—Validity.—An ordinance prohibiting the sale from house to house of a certain commodity without a license, which fails to fix the license fee, is invalid, where the city charter does not give discretion to the city officers in fixing a license.—CITY OF MT. CLEMENS v. SHERBERT, Mich., 81 N. W. Rep. 926.

71. NEGLIGENCE—Defective Bridge — Injury.—Where a defect in a bridge was latent until two or three days before an accident resulting therefrom, and very few discovered it, and it could only have been known by inspection. Pub. Acts 1887, imposing liability on a city for an injury resulting from a defective bridge, providing it is shown to have had reasonable time and opportunity, after notice of the defect, to repair the same, and has not used reasonable diligence to do so, would not charge the city with constructive notice because it failed to inspect the bridge, its condition not having been brought to the knowledge of the city before the accident happened.—THOMAS v. CITY OF FLINT, Mich., 81 N. W. Rep. 936.

72. NEGLIGENCE—Electricity — Insulation of Wires.—It is the duty of an electric light company to make perfect insulation of its wires at places where persons have the right to go for business or pleasure, and to use the utmost care to keep it so.—O'DONNELL'S ADMR. v. LOUISVILLE ELEC. LIGHT CO., Ky., 55 S. W. Rep. 202.

73. NEGLIGENCE — Electric Wires — Insulation.—Plaintiff, engaged in moving a house through the streets, assisted by his son and other workmen, attempted to raise obstructing electric wires, and received a shock, from which he was revived. Soon after the father became dizzy, and, falling against the son, threw him over against the wires, which he grasped, and was killed. Held, in action by the father to recover for the son's death, that the negligence of the father in touching the wires, after being repeatedly warned by employees of defendant, did not contribute to the son's death.—BRUSH ELEC. LIGHT & POWER CO. v. LEFEVRE, Tex., 55 S. W. Rep. 896.

74. OFFICE AND OFFICERS—De Facto Judge.—Accused cannot question the validity of the election of a *de facto* police judge who issued the warrant of arrest against him, and before whom he is arraigned, the lawful acts of *de facto* officers being valid as to third persons.—ORME v. COMMONWEALTH, Ky., 55 S. W. Rep. 195.

75. OFFICE AND OFFICERS—De Facto Officers.—Where a town office of township assessor exists, and subsequently an unconstitutional act is passed retaining such office, but creating a board of assessors to perform its duties in such town, the county clerk cannot justify a refusal to deliver to the township assessor the books and papers necessary for him to perform his duties as such, on the ground that delivery of such books has been made to the board as *de facto* officers, since the office of the board has no legal existence, and hence there can be no *de facto* officer.—PEOPLE v. KNOPF, Ill., 56 N. E. Rep. 155.

76. OFFICE AND OFFICERS — Removal.—The power to appoint an officer carries with it as an incident power to remove him, in the absence of restraint by constitution or statute.—TOWN OF DAVIS v. FILLER, W. Va., 35 S. E. Rep. 6.

77. OPPOSITION TO DISCHARGE.—An objection in the jurisdiction of a court of bankruptcy on the ground that the bankrupt had not resided or had his domicile within the district for the requisite period of time before the filing of the petition cannot be interposed, for the first time, in opposition to the bankrupt's application for discharge, by a creditor who proved and filed his claim, participated in the election of a trustee, and shared in the distribution of the estate.—IN RE MASON, U. S. D. C., W. D. (N. Car.), 99 Fed. Rep. 256.

78. PRINCIPAL AND AGENT—Accounting.—Defendant, having undertaken to purchase, as agent, lands for complainant, stands in a trust relation, though he is to receive nothing for his services; so that, having represented that the price was more than it was, and having received the full amount from complainant, he must account therefor, notwithstanding that complainant sold at a profit, even on the price represented to have been paid.—SALSBURY v. WARE, Ill., 56 N. E. Rep. 149.

79. RAILROADS—Construction — Lien for Labor.—Under Comp. Laws, § 5470, providing that a subcontractor engaged in the construction of a railroad, desiring the benefit of the mechanic's lien law, must file with the clerk of the circuit court of the county or judicial subdivision in which the improvement to be charged with the lien is situated, an account of the demand due him, containing a correct description of the property to be charged, it is sufficient for the subcontractor to describe in his statement that portion of the road only on which he was employed.—ADAMS v. GRAND ISLAND, ETC. R. CO., S. Dak., 81 N. W. Rep. 960.

80. RAILROAD COMPANY — Combinations — Traffic Agreement.—Whether or not the combination of any two given lines of railroad would be contrary to this paragraph of the constitution is a question which cannot be settled under any rule of universal application, but one which must be determined in each case upon its own peculiar facts and circumstances.—STATE v. CENTRAL OF GEORGIA RY. CO., Ga., 35 S. E. Rep. 37.

81. RAILROAD COMPANY — Fires Set by Locomotives—Negligence.—The Act of April 26, 1894 (91 Ohio Laws, p. 187), imposes upon every railroad company operating a railroad or part thereof in this State an absolute liability for loss or damage by fire, originating on its land, caused by operating the road, and the fact that the fire originated on the land of the company is made *prima facie* evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company, nor is the absence of such negligence a defense.—BALTIMORE & O. R. CO. v. KREAGER, Ohio, 56 N E. Rep. 203.

82. RAILROAD COMPANY — Street Railroads—Foreclosure of Mortgage.—Debts created by an electric street railroad company in rebuilding its power house, which had been destroyed by fire, do not constitute claims to which a court is authorized to give preference in payment from the proceeds of the property of the company when sold under mortgage foreclosure to the displacement of the lien of a prior mortgage covering all the property.—MARYLAND STEEL CO. v. GETTYSBURG

ELEC. RY. CO., U. S. C. C., E. D. (Penn.), 99 Fed. Rep. 150.

83. RAILROAD COMPANY — Street Railroads — Franchises.—A franchise to a street railroad company by a township, providing for the sale of trip tickets on cars of the company at a reduced rate between a village in the township and a city without the township, requires such tickets to be sold on cars at any point on the line, and does not limit such sale to the line within the township granting the franchise.—RICE v. DETROIT, ETC. RY., Mich., 81 N. W. Rep. 927.

84. RAILROAD COMPANY—Street Railroads — Punitive Damages.—Where a street car going at a high rate of speed turned by a switch around a corner in a different direction from that indicated by its label, at a dangerous place, and ran against plaintiff's vehicle, it is not error to charge that plaintiff is entitled to punitive damages if the servants of the street car company were guilty of such wantonness or recklessness as to indicate a willful disregard of plaintiff's rights.—NASHVILLE ST. R. R. CO. v. O'BRYAN, Tenn., 55 S. W. Rep. 300.

85. RAILROAD COMPANY — Street Railways — Right of Way.—Where plaintiff's petition and reply in a suit to compel specific performance of a contract to convey a right of way showed that plaintiff did not claim compliance with the terms of the original contract, under which it was not to construct the south line of its right of way less than 25 feet from defendants' house, but alleged that the road was located nearer thereto at defendants' request, and with their assent and agreement, plaintiff was estopped to claim that the distance from the center of the track, and not from the south line of the right of way, was intended by the contract.—JASPER CO. ELEC. RY. CO. v. CURTIS, Mo., 55 S. W. Rep. 222.

86. RECEIVERS.—Where a receiver obtains property under an improper order, which is reversed on appeal, and he is required to restore it to the owner, he cannot claim compensation for himself or his attorneys out of the property.—MCANROW v. MARTIN, Ill., 56 N. E. Rep. 168.

87. RELIGIOUS SOCIETIES—Property—Courts.—Where members of a church society associated with a part of the board of trustees, with knowledge of instructions from the congregation to the board of trustees directing the latter to try to save the church property about to be sold under foreclosure of a trust deed, take an assignment of the debt secured, and purchase at the foreclosure sale, they will be deemed to hold the title in trust for the church, subject to a lien for the amount paid by them therefor; and the trustees are entitled to possession on payment of such sum.—FORT v. FIRST BAPTIST CHURCH OF PARIS, Tex., 55 S. W. Rep. 402.

88. REMOVAL OF CAUSES — Diversity of Citizenship—Formal Parties.—A corporation brought a suit in equity in a State court against persons alleged to be the holders of certain of its stock and bonds, who were all citizens and residents of other States, to obtain an accounting, and the surrender of such stock and bonds, on the ground that they had been obtained by one of the defendants, who was a director of complainant, in fraud of its rights. The bill also alleged that defendants had made a demand on the trustees in the trust deed securing the bonds in suit, with others, for the foreclosure of such trust deed, and made the trustees, one of whom was a citizen of the same State as complainant, parties defendant for the purpose of obtaining an injunction restraining such foreclosure. Held, that the trustees were not indispensable, but merely formal, parties, having no interest in the controversy, and that their joinder did not deprive a federal court of jurisdiction of the suit, which was removable by the individual defendants.—LAKE ST. EL. R. CO. v. ZEIGLER, U. S. C. C. of App., Seventh Circuit, 99 Fed. Rep. 114.

89. SALES—Shipment—Quarantine.—Where fruit sold was shipped by an unusual route, which was the only one to be used at the time by reason of quarantine restrictions, the buyer cannot hold the seller for damages on that account, since, under Rev. St. arts. 4321, 4324, the governor is empowered to quarantine any point when he has reason to believe that there is danger from any infectious disease, and every citizen is charged with knowledge of his quarantine proclamation.—MOBILE FRUIT & TRAD. CO. v. BOERO, Tex., 55 S. W. Rep. 361.

90. SALES—Warranty — Acceptance.—The rule that, where the buyer accepts the goods after having an opportunity to inspect them, he cannot recover damages on the ground that the goods were not of the description contracted for, has no application where the seller expressly guarantied the goods, and, when defects appeared, asked the buyer to give the goods a fair trial, promising to bear the loss if they should then be unsatisfactory; the seller being a manufacturer, and desiring to have the buyer keep its goods in stock, and introduce them in his market.—SOUTH BEND PULLEY CO. v. W. E. CALDWELL CO., Ky., 55 S. W. Rep. 208.

91. SPECIFIC PERFORMANCE — Jury Trial.—An action for specific performance is equitable in its nature, and neither party is entitled to a trial by jury.—PIERCE v. STEWART, Ohio, 56 N. E. Rep. 201.

92. TAXATION—Personal Property.—Where a widow, as curatrix of her minor children, entitled to the fund under the control of the probate court of the city of St. Louis, removed with her children to St. Louis county, and was a resident of such county at the time the city levied an assessment thereon, such assessment was invalid, under Rev. St. 1889, § 7508, declaring that all personal property in the county, other than that where the owner resides, shall be assessed in the county of the owner's residence.—ZIEGENHEIN v. MCCAUSLAND, Mo., 55 S. W. Rep. 218.

93. TELEGRAPH AND TELEPHONE COMPANIES—Injuries from Construction — Damages.—A telephone company authorized to string its wires along a highway may, without giving an abutting proprietor an opportunity to do so, cut the branches of his trees along the highway, in a proper manner, to prevent any obstruction of its wires; being answerable only for abuse of the right.—WYANT v. CENTRAL TEL. CO., Mich., 81 N. W. Rep. 929.

94. TENANCY IN COMMON—Waste by Co-Tenant.—If one tenant in common take coal from land without the consent of another, he must account to that other therefor, and cannot keep the proceeds of the sale of the coal, without accounting, on the theory that the portion of land furnishing the coal is no more than his just share.—CECIL v. CLARK, W. Va., 35 S. E. Rep. 11.

95. VENDOR'S LIEN—Security.—Where a lien for a part of the purchase price of land was expressly reserved in the deed, and afterwards included in a note, the renewal of such note, with sureties, of itself neither releases the lien, nor creates a presumption that it was intended to be discharged.—WILCOX v. FIRST NAT. BANK OF AUSTIN, Tex., 55 S. W. Rep. 317.

96. WILL—Collateral Relatives—Inheritance.—Rev. St. ch. 39, § 2, providing that an illegitimate's estate shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases, confers no right whatever on collateral relatives, but only gives the survivors named the same rights as if the decedent had been legitimate.—HUDNALL v. HAM, Ill., 56 N. E. Rep. 172.

97. WILL—Interpretation—Intention.—A testator devised 208 acres of land, definitely described, to his daughter, "and also" 88 acres on which "she now lives" for life. Held, that the use of the copulative words "and also" indicates his intention to have been to apply the limitations to the first, as well as to the second tract.—NOBLE v. AYERS, Ohio, 56 N. E. Rep. 199.

98. WITNESS—Abortion.—A wife is competent to testify in behalf of her husband in an action by him against a physician for producing an abortion upon her, on the ground of public policy.—CRAMER v. HURT Mo., 55 S. W. Rep. 258.